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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

GABRIEL AGUIRRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the Tenth Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. DO THE PARAMETERS WITHIN WHICH A COURT MUST CONDUCT A REMMER HEARING INCLUDE THE REQUIREMENT THAT QUESTIONS OF POTENTIALLY TAINTED JURORS BE ASKED IN A FAIR AND OPEN ENDED MANNER, CALCULATED TO ELICIT AN UNBIASED RESPONSE?

   A. DO LEADING QUESTIONS WHICH ELICIT A YES/NO RESPONSE VIOLATE THE FUNDAMENTALS OF PROCEDURAL DUE PROCESS BY DENYING THE DEFENDANT THE OPPORTUNITY FOR A HEARING IN WHICH ALL PARTIES MAY BE HEARD AS REQUIRED UNDER REMMER?

II. WHAT IS THE QUANTUM OF EVIDENCE NECESSARY TO OVERCOME THE REMMER PRESUMPTION OF PREJUDICE?

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REPORT OF OPINIONS

The decision below is reported at United States v. Aquirre, 922 F.2d 602 (10th Cir. 1990).

JURISDICTION

The opinion of the Court of Appeals was entered December 28, 1990, and the order denying rehearing of the matter was entered on March 18, 1991. This court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of U.S. CONST. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses

in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The proceeding in issue was the second trial of the accused. The first trial ended in a mistrial. On February 15, 1990, 3 days after the trial began, the District Court became aware of an incident in which one of the jurors was contacted by an outside source. On February 13th, a man called the home of juror Lonnie Funk stating that he worked for a Manhattan, Kansas radio station. The juror was staying in Topeka, Kansas, where the trial was located, so the caller requested a number where he could be reached from the juror's wife. He then proceeded to call Funk and inform him that he had won a drawing from the radio station entitling him to one thousand dollars worth of free auto body work. As

the juror had not entered any drawing, the caller stated that another person had entered him in the contest as a prank. The caller then arranged a meeting allegedly for promotional purposes at a local restaurant. The juror became suspicious and had his wife attempt to verify if the caller did indeed work for the radio station. Upon discovering that such was not the case, the juror called the imposter to confront him and in the course of the conversation the caller stated he was attempting to sell coupon books. At this point the meeting was canceled.

On January 14, 1990, the caller again phoned juror Funk stating that he was the brother of co-defendant and witness for the prosecution, Randy Thomas. The caller expressed a need for them to "get together and talk". The caller stated in response

to Funk's reluctance, "I will make it worth your while." Funk discontinued the conversation at that time. Funk testified that the first phone call had "really scared" his wife, and would have upset her more if she had known of the phone calls on the 14th.

While Funk discussed the incident with a court officer, a number of jurors overheard the conversation and immediately requested to know what had happened. Funk testified in chambers that he had discussed the incident with four other jurors.[1] One juror testified that he knew of both the phone calls and he believed so did the majority of the jury. Another had heard parts of the conversation between Funk and the other jurors. One knew that

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[1] Juror Funk's testimony is reprinted in pertinent portion in the appendix to this petition.

Thomas's brother had contacted Funk. One believed there had been an offer of money. Four others knew of the call but not its contents. One was troubled that Funk knew something the rest of the jury did not. And one did not know the nature of the incident, but stated she was aware of "a cloud" over the proceedings.

The court then questioned the jurors individually. During questioning of the jury panel, defense co-counsel Richard Winterbottom, stated to Judge Rogers that the judge's questions were phrased in a leading manner. Furthermore, counsel felt that given the judge's position of authority, it was unlikely that the juror would answer in a manner wherein he or she felt unpressured. Counsel then suggested open ended questioning. However, despite this request, leading questions were repeatedly asked of jurors.

Based on this incident, the defense moved for a mistrial. The motion was denied.

ARGUMENT

I. DO THE PARAMETERS WITHIN WHICH A COURT MUST CONDUCT A REMMER HEARING INCLUDE THE REQUIREMENT THAT QUESTIONS OF POTENTIALLY TAINTED JURORS BE ASKED IN A FAIR AND OPEN ENDED MANNER, CALCULATED TO ELICIT AN UNBIASED RESPONSE?

The trial by jury is "the most priceless" component of the concept of "individual liberty and of the dignity and worth of every man. . ." Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). The Sixth Amendment of the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . ." Inherent in this

concept is the independence of the jury. Such independence is essential to ensure the jury is able to hear all evidence and render a decision based solely on the facts and law properly presented to them in a court of law.

Any unauthorized contact between the jury and third persons in regards to an ongoing trial raises the issue of whether the jury can continue to operate in an impartial manner. Patterson v. Colorado, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907). That such contact with a juror is presumptively prejudicial was recognized by this Court in the latter portion of the nineteenth century in Mattox v. United States, 146 U.S. 140, 150, 13 S.Ct.50, 53, 36 L.Ed. 917 (1892), when the court stated that "[p]rivate communications, possibly prejudicial, between jurors and third persons. . . are

absolutely forbidden and invalidate the verdict unless their harmlessness is made to appear."

In Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), a juror who later became jury foreman was contacted by an unnamed third party who informed the juror he could profit should the defendant be found not guilty. The defense was not apprised of this situation until after a verdict of guilty had been returned against the defendant. This Court held that following outside contact with a juror, the trial court "should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." Id. 347 U.S. at 229, 74 S.Ct at 451 (emphasis added). The Court based it's decision on the premise that

"[t]he integrity of the jury proceedings must not be jeopardized by unauthorized invasions." Id. It is the scope and nature of this hearing to which the petitioner directs the Court's attention.

It has been noted that the trial court is required to investigate the tampering or taint upon the court's learning of a potentially bias producing situation in order to determine if there has been a Sixth Amendment violation. United States v. Shackleford, 777 F.2d. 1141 (6th Cir. 1985). However, the procedure with which this investigation is conducted varies both in method and efficiency. The various federal district courts have held that the trial judge is to be accorded wide discretion in determining what action to take following contact with a juror. See, United States v. Forrest, 620 F.2d 446 (5th Cir. 1980);

United States v. Shackleford, 777 F.2d 1141, 1145 (6th Cir. 1985); United States v. Machi, 811 F.2d 991, 1005-7 (7th Cir. 1987); United States v. Solem, 728 F.2d 1149, 1152 (8th Cir. 1984); United States v. Day, 793 F.2d 232, 243 (10th Cir. 1987); United States v. Adams, 799 F.2d 665, 669 (11th Cir. 1986). Hence, the manner in which these hearings are conducted and the determination on whether the defendant has been prejudiced vary extensively.

In United States v. Pennell, 737 F.2d 521 (6th Cir. 1984), five jurors were threatened telephonically during the course of the trial. They reported this incident to the trial judge after discussing the incident with the other jurors. A hearing was conducted wherein the court first questioned the five jurors individually. The jurors were allowed to

express themselves in full and complete sentences stating whether they felt they would be biased or not. The jurors made statements such as, "I don't believe [my decision making ability] is impaired in the least". One juror stated three times she would consider only the evidence. Id. at 529. Finally the entire jury was summoned and a number of questions were asked to determine if the jury could render a verdict in an impartial manner. Id. One of the uncontacted jurors became agitated and felt she might be unable to render a verdict. She was subsequently questioned and reassured by the court. The questioning again took an open ended form.

> "The Court: . . . But what I need to know from you is whether you can still perform your responsibilities as a juror?

> Juror Lorenz: . . . I believe so. As long as I have something stating or somebody stating that nothing is going to become of all this. I mean . . .
>
> The Court: I have every reason to believe that nothing will. And the Court has initiated some processes on this matter. I will say nothing more than simply that."
>
> Id. at 530.

On appeal, the Sixth Circuit found that the court's reliance on the assurances of the juror's that they would be impartial was sufficient, and was a satisfactory basis to render a decision as to whether actual prejudice had been shown. Id. at 533.

The questions in Pennell were open ended and allowed the juror to fully

express himself without being in the confines of a yes/no answer or otherwise leading questions. Such allows the judge, as well as the jurors and counsel for both parties, the opportunity to fully apprise themselves of the jurors feelings as it respects their ability to remain unbiased much more effectively than does a series of leading questions such as those elicited in the case at hand. This manner is by far a superior approach to seeking out potential bias in otherwise well intentioned jurors.

In Owen v. Duckworth, 727 F.2d 643 (7th Cir. 1984), a juror was contacted by an anonymous phone caller who made a threatening statement. The juror was interviewed by the Court and in response to a question regarding whether she had been biased stated, "I think I'm going to continue and be fair minded". The juror

was thereafter instructed not to discuss the threat with other jurors and a motion for mistrial was denied. After the trial, it was learned that the juror may have discussed the threat with other jurors. Post-conviction proceedings were held. However, they were terminated when the trial court determined they might "invade the province of the jury's deliberations". The defendant's conviction was affirmed on a direct appeal and the defendant, subsequently, went to the Federal District Court on a Writ of Habeas Corpus. That petition was denied, but on appeal the issue of juror prejudice was argued. Here, the determination of prejudice was made at the post-conviction level. The Court found that "rather than question the jurors directly, a district court must make findings of fact at two separate levels. First the district court must

find the basic or subsidiary facts - e.g., the nature, content and extent of the extra-judicial contact. Based on its findings of subsidiary facts, the district court must then make the ultimate factual determination: whether the contact likely effected the jurors impartiality." Id. at 646.

In United States v. Adams, 799 F.2d 665 (11th Cir. 1986), a juror was visited at her home by a woman who reportedly was looking for a job at the juror's place of employment. The woman stated she was looking for new work because her boss was selling the store she managed at that time. This was due to his being on trial for selling marijuana. The woman suggested that perhaps the juror could help her boss out, thereby eliminating the need for the woman to seek new employment. The juror returned to the courtroom the

next day and began to discuss the matter with several other jurors. She was then directed to go to see the judge immediately. The judge questioned the woman who was subsequently replaced with an alternate juror. It was only after the judge conducted interviews of the remainder of the jury in post-verdict interviews that he discovered that the juror had, in fact, mentioned the incident to other members of the jury. Counsel then had an opportunity to review the transcripts and, again, the jurors were interviewed, this time with counsel present. The Appellate Court held that this type of proceeding was proper, although a better procedure would be to hold a hearing immediately when counsel is present. Furthermore, the post-verdict interview with counsel in attendance, was sufficient to demonstrate a lack of

prejudice. This case demonstrates another of the many and varied means in which juror tampering or misconduct is investigated by the various trial courts. Although the manner of questioning is not evident, the differing procedure by which the Court examines potential jury bias is apparent.

The difficulty in assessing the true nature of juror bias has been noted by commentators. See, e.g., Note, Criminal Law-The Right to An Impartial Trial Is Protected By An Opportunity to Prove That Juror Bias or Prosecutorial Misconduct Affected the Outcome of the Trial, 26 How.L.J. 799 (1983). "The lack of any probative objective criteria makes the goal of determining the jurors partiality or impartiality utterly incapable of proof." Id. at 803, (citing Note, Juror Bias-A Practical Screening Device and the

Case for Permitting Its Use, 64 Minn.L.Rev. 987, 992-993 (1980)). Although the jurors ability to express himself as to whether he or she is or is not biased was mentioned in passing in Dennis v. United States, 339 U.S. 162, 171, n.7, 70 S.Ct. 519, 94 L.Ed. 734 (1950).[2] This well meaning but overly optimistic attitude was brought into question in Justice O'Connor's concurring opinion in Smith v. Phillips, 455 U.S. 209, 221-222, 102 S.Ct. 940, 949, 71 L.Ed.2d 78 (1982). "Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own

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[2] "[o]ne may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter."

bias and partly because the juror may be unaware of it."

In the present case, the questions asked by Kansas Federal District Court Judge Richard Rogers was phrased in a leading manner as pointed out by Defense Counsel Winterbottom. (Transcript Vol. IV, p. 752, lines 10-23). As stated by Counsel Winterbottom, leading questions do not reveal what the juror's true feelings are. Furthermore, given the judge's position of authority and the manner in which the questions are asked, a juror is going to say that he or she is not biased because that is basically what the person asking leading questions is asking them to say. (Transcript Vol. IV, p. 752, lines 20-23). Counsel at that time requested that open end questions be asked. Despite the suggestion, questioning continued to be conducted in a leading manner. For

example, in questioning juror Steven Adams, the Court asked:

> Question: "Do you remember all the work we went to to qualify the jurors at the start of this period? Has this had any - - this outside information, you are not going to consider this in any way? Is that correct?"
>
> Answer: "No."
>
> Question: "As far as this case is concerned?"
>
> Answer: "No."

(Transcript Vol. IV, p. 756, lines 15-22).

Other jurors were asked questions such as:

> Question: "Now let me found out in decidiing this case now, can you decide this case based solely on the evidence you heard in the courtroom and the instructions of the Court and remove this entirely from your mind? Can you do that?"
>
> Answer: "Very definitely, I could."

(Transcript Vol. IV, p. 726, lines 14-19).

Further questions include those such as:

> Question: "So this aroused some thoughts in your mind apparently as to what this was all about. Is that correct?"

Answer: "Yes."

Question: "But it would not interfere in all of the requirements I placed for an independent juror at the start of this case, is that correct?"

Answer: "No. I don't feel it would be on my part."

Question: "If you need to serve, you can now decide this case based on the evidence you heard from the witness stand and instructions of the Court, is that correct?"

Answer: "That is correct."

(Transcript Vol. IV, p. 721, lines 11-23).

Troublesome questioning as noted by the Tenth Circuit Court of Appeals includes the following:

Court: "Now let me ask you from what you've heard there, anything about that, arising from that entire thing, that would make it difficult for you to be completely fair and impartial in this case and decide this case based only on the evidences you heard from the witness stand and the instruction of the Court? Can you do that?"

Juror: "Give a fair verdict?"

Court: "Yes.

Juror: "Yes."

Court: "And give a fair verdict on that?"

Juror: "Yes."

Court: "Now, I want you to do that without any use whatsoever or any thoughts whatsoever arising from these alleged phone calls. Can you do that?"

Juror: "Yes."

Court: "That is outside and has nothing to do with this case. Is that clear to you?"

Juror: "Right, yes."

United States v. Aguirre, 922 F.2d 602, 606 n.8 (1990).

The Tenth Circuit Court of Appeals found that:

> "although a form of questioning that would permit each juror the opportunity to offer evidence in his own words would have been preferable, we cannot say the Court's questioning in this case failed to elicit sufficient responses to allow the Court to assess the harm of the juror contact. Moreover, the Court thoroughly and properly instructed the jurors after the hearing to assure their

> understanding of their responsibility." Id. at 606.

However, this type of instruction merely reinforces in the minds of the juror the matter about which they have just been questioned in regards to and focuses more attention on the problem of outside interference.

The undesirability of leading questions is evinced in Federal Rule of Evidence 611(c) which prohibits leading questions on direct examination. In the Note to Subdivision (c) the Advisory Committee wrote: "The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable." F.R.E. 611(c), note. If a witness is friendly, there is an opportunity for suggestiveness. See Morvant v. Construction Aggregates Corp., 570 F.2d

626, cert. dis. 439 U.S. 801, 99 S.Ct.44 58 L.Ed.2d 94 (C.A. Tenn. 1978). An exception for biased witnesses exists. However, while leading questions may be useful for dealing with the obviously biased witness, they fail to reveal bias in a juror who has been exposed to outside influences. A biased witness is one whom is hostile or clearly identified with an opposing party. Such is not the case in the situation at hand. Leading questions open the opportunity for testimony favorable to the friendly party. The court itself sits in such a position due to the aura of trust and dignity which surrounds it. As noted by commentators "at a hearing to prove actual bias, it is unrealistic to expect a person to admit in a public forum that he or she was less than one hundred percent impartial in weighing the evidence and reaching a fair

verdict." Note, 26 How. L. J. 799, 803 (1983) (citing, 64 Minn.L.R. 987, 991-992 (1980)). Although this Court in Dennis v. United States, 339 U.S. at 171, n.7, noted that a juror is qualified to elucidate his state of mind, it is utterly unreasonable to permit leading questions in an attempt to reveal juror bias at a Remmer hearing. It is simply an inappropriate tool for the stage of analysis in which such a proceeding is conducted.

A. DO LEADING QUESTIONS WHICH ELICIT A YES/NO RESPONSE VIOLATE THE FUNDAMENTALs OF PROCEDURAL DUE PROCESS BY DENYING THE DEFENDANT THE OPPORTUNITY FOR A HEARING IN WHICH ALL PARTIES MAY BE HEARD AS REQUIRED UNDER REMMER?

The opportunity for a fair trial, unfettered by outside interference, is also implicit in the concept of due process. This notion was set forth in

Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642 (1961), wherein the court stated, "[i]n essence the right to a jury trial guarantees to the criminal accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. . . . 'A fair trial in a fair tribunal is a basic requirement of due process'." (Quoting In re Murchinson, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). In discussing the requirements for due process as it relates to the accused's pretrial request for specific evidence, this Court wrote in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) that:

> "The principle of Mooney v. Holohan is not punishment of society for misdeed of a prosecutor but avoidance of an unfair trial to the accused.

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain; 'The United States wins its point whenever justice is done its citizens in the courts.'"(footnote omitted)

Id. at 1197.

The United States Supreme Court has written that the extent of procedural due process required is determined by the extent of the loss suffered when weighed against the government's interest in summary adjudication. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct.1011, 25 L.Ed. 2d 287 (1970).

Procedural due process places requirements on any proceeding in which an individual is deprived of a liberty or property interest within the due process

clause of the Fifth Amendment. Mathews v. Eldridge, 424 U.S. 1309, 333, 96 S.Ct. 893, 901, 47 L.Ed 74 (1986). Thus it is essential that certain procedural requirements be placed on the Remmer hearing in order to insure that due process requirements are met. This is so because the ability for the jury to impartially review the evidence and return an unbiased verdict against the defendant is essential if he is not to be unfairly deprived of his liberty interest.

Due process requires the opportunity to be heard at "a meaningful time and in a meaningful manner". Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). For "due process unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances". Mathews v. Eldridge, 424

S.Ct. at 334, 96 S.Ct. at 902 (citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961)). This Court in Mathews, set forth a three prong test for determining whether a particular process meets the mandates of due process. First, it is necessary to determine the interests that will be effected by the action. Secondly, one must determine the risk of erroneous deprivation of that interest as it pertains to the procedures presently used and the probable value of "additional or substitute procedural safeguards". And lastly, one must consider the government's interest, including the additional burdens the government would sustain through new or additional procedural requirements.

In the present case, the private interest that will be effected is loss of the right to a fair and impartial jury

unbiased by outside influences. This right touches the core of the constitutional fabric upon which this country is predicated. Its value cannot be underestimated. Although the Court has recognized that jurors cannot be entirely ignorant of surrounding facts and issues, see, Irvin v. Dowd, 366 U.S. at 721, 81 S.Ct. at 1642, intrusions by extraneous forces into the jury's workings which are aimed at and directed towards disrupting the jury's workings, represents the most heinous type of attack on this fundamental concept. Not only does the defendant risk the loss of the opportunity to receive a trial by a fair and impartial jury, he also risks the loss of his personal liberty based on bias and information not properly before the jury. This loss of personal liberty and in some cases, the potential loss of one's life, is the most

intrusive invasion on an individual's right to exist that a Government, by and for the people, can impose on its residents and citizens. Hence, it is of the utmost importance that instances of misconduct by or towards a jury be ferreted out in a manner specifically calculated to reach and maintain the goal of a fair and impartial jury. Imposing a standard whereby fair, open-ended, and non-leading questions are proposed to potentially tainted jurors is valuable as a means of providing such a safeguard and is of significant value both to the defendant and the concepts upon which this nation is founded.

Finally, the government's interest would not be seriously inhibited or burdened as the additional criteria would require nothing more of the district court judge than to question the jury members in

a non-leading manner specifically geared towards discovery of potential biases. The Court is already trained to act in such manner as judges are experienced lawyers, highly adept at developing non-leading questions. Furthermore, non-leading questioning directed towards a potential jury panel is a skill developed through voir dire, a trial function in which the judge plays a major role in the federal courts.

It is imperative that the Court clarify the scope of the Remmer hearing and set forth the manner in which questioning should be conducted in order to provide guidance to the lower courts. This is essential in order to clearly define the parameters within which the judge may operate in order to effectively reveal potential juror bias. A more concrete analysis of what is required

would serve the purposes of both the Sixth Amendment right to a fair trial and further the requirements of due process as guaranteed by the Fifth Amendment.

II. WHAT IS THE QUANTUM OF EVIDENCE NECESSARY TO OVERCOME THE REMMER PRESUMPTION OF PREJUDICE?

In Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed 654 (1954), this Court held that any indirect contact with a juror was presumptively prejudicial. This presumption is not conclusive, "but the burden rests heavily upon the government to establish. . . that such contact with the juror was harmless to the defendant." However, as noted by one commentator, the Court in Remmer failed to articulate a standard by which the rebuttal of such a presumption could be adjudged. Note, Smith v. Phillips: Misconduct By Or Affecting A Juror In A

Criminal Prosecution, 62 B.U.L.Rev. 361, 365, 367-68 (1982). Rather, the Court in subsequent cases has chosen to rely on constitutional principles in rendering it's decisions. Id. at 368. As such, the standard to be met by the government and the subsequent shifting of the burden to the defendant, has remained an amorphous standard. Clarification of this standard is necessary to ensure uniform and just application.

In the subsequent case of Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), this court, while relying heavily on Remmer, indicated that in a post conviction hearing to investigate allegations of juror misconduct, it was constitutionally adequate to require the defendant to show actual bias. It is unclear whether this case has shifted the burden to the

defendant to prove actual bias while relieving the government from it's burden, or whether a shifting of the burden to the defendant following the government's overcoming the presumption, is permissible. Again, however, determining when that presumption is met, remains unclear. Finally, a third possible reading becomes articulatable, which is that the actual bias test only applies in the post conviction setting, or in situations of misconduct by the juror, rather than influence by third parties.

In the present case, the Tenth Circuit Court of Appeals held, that:

> "[t]he government bears a heavy burden to establish that the communication was harmless. Id. at 229. The Court subsequently clarified the nature of that burden and rejected the notion that the law must impute bias to a juror's answers. Smith v. Phillips, 455 U.S. 209 (1982). (quoting Dennis v. United States, 339 U.S. 162, 171, n.7,

> 70 S.Ct. 519, 94 L.Ed. 734 (1950) See also United States v. Zelinka, 862 F.2d 92, 95 (6th Cir. 1988); United States v. Butler, 822 F.2d 1191, 1197 (D.C. Cir. 1987). Once the government rebuts the presumption of prejudice in a Remmer hearing, the burden then shifts to defendant to show actual prejudice. See United States v. Day, 830 F.2d 1099, 1105 (10th Cir. 1987).

United States v. Aguirre, 922 F.2d 602, 606 (1990).

The citation to Smith wherein the Court quotes Dennis restates the proposition discussed earlier in this Petition, which is that the Court will assume a juror is telling the truth with regards to his state of mind and possible bias. As discussed above, such a premise ignores basic human psychology. Furthermore, both Justice O'Connor's concurring opinion in Smith and a three Justice dissent acknowledge the naivety of such a statement. Nor did the holding in

Smith eliminate implied bias in some situations as Justice O'Connor clearly pointed out. The Smith decision did nothing to clarify what the government or the defendant is required to prove in a Remmer hearing.

In United States v. Day, 830 F.2d 1099 (10th Cir. 1987), the Tenth Circuit discussed the proof requirements in the Remmer hearing. Relying on an earlier Tenth Circuit decision, United States v. Greer, 620 F.2d 1383 (10th Cir. 1980), the Court stated that a defendant must offer sufficient evidence to trigger the presumption of prejudice. Id. at 1103. In Day, several jury members had been in the restroom during a break in the trial proceedings when an F.B.I. Agent, who was acquainted with one of the jurors and who was a witness at the trial, stated that the next tape they were about to hear was

going to "put everyone to sleep". The Court interviewed the F.B.I. Agent and reprimanded him for having made the statement but did not interview any of the jurors. In finding that the presumption of prejudice was overcome, the Court relying on Smith v. Phillips, stated that:

> "the Supreme Court has held that a trial court can rely upon its self evaluation of the alleged bias of jurors in determining actual juror bias. (cites omitted) So too, did the trial court in the case at bar rely upon its self evaluation and the effect of Agent Fender's comments on the juror. Thus the testimony given Agent Fender, uncontradicted by the defendants, did overcome the presumption of prejudice. In our view, it was then the burden of defendants-appellants to present evidence demonstrating actual prejudice. This they failed to do.

Id. at 1105.

The Court found that the Judge had followed the Remmer requirements in considering the agent's contact with the

juror and rendered his decision "guided by the presumption of prejudice". Id. at 1106. The Court thus found that no actual prejudice had occurred. Finally, the Tenth Circuit stated that the decision by the trial court regarding how to proceed with allegations of juror misconduct will not be reversed except for abuse of discretion. Id. Unfortunately, however, this again fails to clearly delineate the threshold requirement that the government is required to meet. Apparently, under Day, even a scintilla of evidence is sufficient to meet that burden, and then shifts the burden to the defendant who must rebut it with a finding of actual bias.

Actual bias is a virtually impossible standard to meet. It again enters into the amorphous region of juror psychology and feelings. The state courts have

discussed actual bias and found it to be "determined by the potential juror's state of mind and, by necessity, this must be ascertained by experience, attitudes, opinions, and feelings of the juror". State v. Brooks, 631 P.2d 878, 884 (Utah 1981). Another state court has found it to be "where factual bias for or against one of the parties is shown to exist". Smith v. State, 477 N.E.2d 311, 313 (Ind.App. 1985).

The Tenth Circuit approach of shifting the burden to the defendant to show actual prejudice upon the production of virtually any evidence by or for the government, places an imponderable burden upon the defendant and cannot possibly be what was intended by the United States Supreme Court when it rendered its decision in Remmer. Additionally, this shifting of the burden of proof violates

the right to due process encompassed in the Fifth Amendment of the United States Constitution in the same manner as that discussed earlier in this petition.

The Sixth Circuit Court of Appeals has taken a somewhat different tact to that of the Tenth Circuit. In United States v. Pennell, 737 F.2d 521 (6th Cir. 1984), cert. den. 469 U.S. 1158, 105 S.Ct. 906 (1985), the Court found that "in light of Phillips, the burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in the actual juror impartiality. Prejudice is not to be presumed." Id. at 532. The Court then went on to find that the district court may rely upon juror assurances of impartiality in deciding whether the defendant had met the burden of proving actual prejudice. Id. at 533.

This approach results in completely

removing the presumption of prejudice from the government and placing the burden upon the defendant to show bias. Furthermore, it allows any statements by any juror or witness that the contact did not prejudice them, no matter how overwhelming the evidence to the contrary may be or how compelling the arguments of counsel may appear, to be sufficient to support a finding that there was no actual prejudice to the defendant. In light of state court decisions defining actual prejudice as that bearing on the state of mind of the juror and the Sixth Circuit approach which finds that despite the juror's state of mind his assurances are sufficient to overcome an actual prejudice, the defendant is placed in the unenviable position of trying to convince the emperor that he is indeed standing naked on the parade grounds.

As the United States Supreme Court has failed to set forth a workable standard by which the presumption of prejudice threshold can be analyzed by the Federal District Courts, these Courts have taken several approaches. Unfortunately, all of these approaches have raised the threshold to an impossible level for the defendant to meet and have, in effect, shifted the burden to the defendant to overcome, upon the showing of any evidence no matter how tenuous, on behalf of the government. Such a burden violates the tenets of due process. Thus, clarification of the standard to be met by the government, and thereafter by the defendant, should be established by this Court.

CONCLUSION

For the reasons stated, Petitioner respectfully request that the Court grant

this Petition and issue its writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the opinion of that court in Petitioner's case.

Respectfully Submitted,

LAW OFFICE OF
JOSEPH D. JOHNSON, CHARTERED

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Appellee,	)	
v.	)	90-3160
	)	
GABRIEL AGUIRRE,	)	
	)	
Defendant/Appellant.	)	

ORDER

Filed March 18, 1991

Before HOLLOWAY, CHIEF JUDGE, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

This matter comes on for consideration of appellant's suggestion for rehearing en banc, which the court treats as a petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court
Robert L. Hoecher, Clerk
By: _____
Patrick Fisher
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee ,	)	
v.	)	No. 90-3160
	)	
GABRIEL AGUIRRE, Defendant-Appellant.	)	

JUDGEMENT
Entered December 28, 1990

Before SEYMOUR, MOORE, AND Brorby, Circuit Judges

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. It is the further order of this court that Gabriel Aguirre, appellant, shall, within thirty (30) days from and after the date of this filing of the mandate of this court in the district court, surrender himself to the custody of the United States Marshal for the District of Kansas in execution of the judgment and sentence imposed upon him.

The District Court may, in its discretion, permit the appellant to surrender directly to the designated

Bureau of Prisons institution for service of sentence.

Entered for the Court

ROBERT L. HOECKER

By: Patrick Fisher
Chief Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. OSCAR ARMENDARIZ, Defendant-Appellant.	No.90-3140 Appeal from the United States District Court for the District of Kansas (D.C. No. 89-40016-01)

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GABRIEL AGUIREE, Defendant-Appellant.	No. 90-3160 Appeal from the United States District Court for the District of Kansas (D.C. No. 89-40016-02)

John J. Ambrosio, Topeka, Kansas for Defendant-Appellant Oscar Armendariz.

Joseph D. Johnson, Topeka, Kansas (Richard A. Winterbottom of Michael L. Stout & Associates, Albuquerque, New Mexico, with him on the briefs) for Defendant-Appellant Gabriel Aguirre.

Kurt J. Shernuk, Assistant United States Attorney (Lee Thompson, United States Attorney and Tanya J. Treadway, Assistant United States Attorney, with him on the brief), Kansas City, Kansas, for Plaintiff-Appellee United States of America.

Before SEYMORE, MOORE, and BRORBY, Circuit Judges.

MOORE, Circuit Judge.

In this consolidated appeal, codefendants Oscar Armendariz and Gabriel Aguirre assert they were denied the right to a fair trail and an impartial jury under the Sixth Amendment when the district court refused to grant a mistrial after a juror was improperly contacted by a third party. Codefendants also urge

error in the district court's failure to suppress the contents of conversations intercepted by state court wiretap authorization. In addition, Mr. Aguirre separately contends the district court abused its discretion in denying his motion for severance. We affirm.

I. Background

Codefendants were charges with conspiracy to distribute marijuana and Mr. Aguirre with an additional count of use of a telephone to facilitate the conspiracy based on evidence gathered from wiretaps placed on the telephone in Mr. Armendariz's residence, his place of business, and the home of a close associate. The information gathered from the taped conversations was utilized to obtain warrants to search codefendants' residences. The search of Mr. Armendariz's rural home in Manhattan,

Kansas, produced eight one-pound bags of marijuana, $134,700 in cash, a Motorola pager, and drug paraphernalia; and that of Mr. Aguirre's residence in Deming, New Mexico, uncovered sixty pounds of marijuana in an abandoned car on the property and firearms which were taken from the house. In addition, the government negotiated a plea agreement with Randy Thomas, identified in the intercepted conversation as Mr. Armendariz's customer in California. Mr. Thomas agreed to testify against Mr. Armendariz.

During codefendants' second trial,[1] government witnesses testified on the procedure followed to intercept calls to the three telephone lines; the monitoring

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[1] The first trial ended in a mistrial when one of the government's witnesses offered testimony prohibited by a motion in limine.

of the calls; the searches of the residences; and the results of laboratory testing of the substances found. The government's key witness, Randy Thomas, explained how he received thirty pounds of marijuana which he repackaged into one pound bags and then arranged to send payment of $25,000 in cash to Mr. Armendariz. In one taped conversation introduced into evidence, the jury heard Mr. Thomas tell Mr. Armendariz that some of the marijuana sent had molded while in his storage shed. In his defense, witnesses for Mr. Aguirre controverted testimony on the ownership of his residence in Deming.[2]

On the morning of the third day of trial at the conclusion of the

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[2] The government produced Mr. Aguirre's New Mexico driver's license found in the Deming residence to establish his ownership of the property.

presentation of this evidence, one of the jurors, Mr. Lonnie Funk, told the courtroom deputy that he had received a telephone call from a person identifying himself as Kenny Thomas, Randy's brother. The courtroom deputy relayed the story to the court.

In chambers, the court assembled counsel and informed them that, in light of this unusual development, the court would question Mr. Funk to ascertain whether the conversation had any effect on his ability to serve as a juror. In the ensuing proceeding in chambers, Mr. Funk explained how he had first received a call from "Bill at radio station KMKF in Manhattan, Kansas." Bill told Mr. Funk his name had been entered as a prank in a drawing for $1,000 free work on a car, and he had won. After arranging to meet Bill, Mr. Funk asked his wife to call the radio

station and verify Bill's story. Told that no Bill worked at the station, Mrs. Funk called her husband, who had stayed in Wichita during the trial, and told him what she had learned. Mr. Funk, then testified that the following night, the same person called, apologizing for the charades and identifying himself as Kenny Thomas. "Does Kenny Thomas ring a bell for you?" the caller asked. When Mr. Funk said, no, the caller reminded him that his brother, Randy, was a witness in the trial. Mr. Funk continued:

> And right away that clammed me up. I didn't know what to say. And I -- he said, "I need to meet you." And I says, "Well, I can't, I'm a jury member, and I'm just not supposed to talk about this case to anybody." So he says, "Well, I will make it well worth your while." He ways, "No matter what I do, you won't meet me? And I says, "No, I can't," and I hung up on him. And I went to bed last night thinking about it, and I dreamt about it and everything else.

So I don't know.

Mr. Funk told the court he had no further contact with the caller and had no idea what he wanted.[3] Counsel for Mr. Armendariz asked Mr. Funk if he had mentioned the incident to other members of the jury. Since four other jurors, Mr. Funk knew, had overheard his conversation with the courtroom deputy, he then elaborated for them, offering that he couldn't figure it out whether it's for one side or the other side. You know, it just doesn't make sense." When defense counsel again expressed his concern whether Mr. Funk still had an open mind,

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[3] In response to the court's question, "[D]o you feel that this has any impact on any of your duties here in this case as far as has it pushed you in one direction or in another direction at all?" Mr. Funk answered, "No, not really . . . you know, if it's for one side or the other side or what . . . . You know, I'm still the same. It's not going to influence."

Mr. Funk answered that he felt he had the sense "to look at the evidence and the testimony and make our decision according to that."

The court then called individually the four jurors to whom the incident was recounted. In the course of the subsequent questioning, counsel for the government and the defense agreed with the court that jurors should be asked what they specifically heard and what effect the conversation had on their ability to remain impartial. Although each juror stated the incident had no consequence, counsel for Mr. Armendariz moved for a mistrial, urging that the credibility of the government's key witness, Randy Thomas, was affected.[4] The court denied

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[4] Defense counsel stated, "This jury isn't thinking that the Government put him up to this. This jury isn't going to think that anybody else except the

the motion but proceeded to summon each remaining juror to determine what influence the contact might have had. At the close of the questioning, counsel for both defendants again moved for a mistrial. The court overruled the motions.[5]

Upon reconvening the trial, the court instructed the jury:

> Members of the jury, a matter has been raised with each of you this morning regarding the possible prejudicial effect of an outside communication. Your deliberation should be upon the evidence in this case, ignoring

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defendant or the defendants put them up to this."

[5] The court was vexed, stating, "I'm going to overrule and deny all motion for a mistrial. We're going to proceed with this case. I am very disappointed with this case. There is no way the attorneys can advise me that this will not happen again time after time, after time in a case like this . . . . I'm going to personally ask the FBI to investigate this situation. So that's going to be the Court's ruling.

> any information which may have come to your attention from outside sources including discussions with other jurors. You are instructed not to speculate about any matter raised from any outside source. It must have no influence whatever in your deliberations. If you cannot follow this instruction or do not believe you can avoid all speculation and discussion concerning outside matters in your verdict on this matter, then you must tell the Court at this time. Does anyone want to tell me they cannot follow that instruction?

Receiving no response, the court ordered final arguments and then instructed the jury. Subsequently, the jury found Mr. Armendariz guilty on Count I and Mr. Aguirre guilty on Counts I and II. Mr. Armendariz was sentenced to five years in prison on Count I and a five-year period of supervised release. Mr. Aguirre received a four-year sentence on both counts to run concurrently and a two-year period of supervised release.

II. Improper Juror contact

Arguing the district court abused its discretion in denying their motion for a mistrial, codefendants urge that an outside contact with a juror coupled with the circumstances of the communication is per se ground for mistrial. This theory is predicated on the assertion that a juror's testimony about his ability to remain impartial is inherently suspect. No juror, codefendants assert, can resist the desire to please the court even in the face of certain misgivings.[6]

To overcome the presumptively prejudicial impact of any unauthorized

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[6] For example, in this case, codefendants underscore that Mr. Funk, later chosen foreman of the jury, stated his wife was frightened by the calls to their home, and he dreamed about Kenny Thomas's call the night before he told the court. Yet, codefendants emphasize, Mr. Funk said the contact didn't affect him one way or the other.

private communication with a juror in a criminal case, under Remmer v. United States, 347 U.S. 227, 229-30 (1954), the trial court "should not decide and take final action ex parte . . . but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." The government bears a heavy burden to establish that the communication was harmless. Id. at 229. The Court subsequently clarified the nature of that burden and rejected the notion that the law must impute bias to a juror's answers. Smith v. Phillips, 455 U.S. 209 91982).[7] See also United States

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[7] In Smith, the Court quoted its observation in Dennis v. United States, 339 U.S. 162, 171, n.7 (1950), "[o]ne may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is

v. Zelinka, 862 F.2d 92, 95 (6th Cir. 1988); United States v. Butler, 822 F.2d 1191, 1197 (D.C. Cir. 1987). Once the government rebuts the presumption of prejudice in a Remmer hearing, the burden then shifts to defendant to show actual prejudice. See United States v. Day, 830 F.2d 1099, 1105 (10th Cir. 1987).

In this case, the district court's questioning of the individual members of the jury, supplemented by suggestions from counsel, fulfilled the Remmer hearing requirement. Nevertheless, codefendants argue the court's style of questioning intimidated jurors into answering what the court wanted to hear.[8] Although a form of

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trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter."

[8] Despite suggestions from defense counsel, the court's questioning gave jurors little room to freely respond. For

example:

> Court: now, let me ask you, from what you heard there, anything about that, arising from that entire thing, that would make it difficult for you to be completely fair and impartial in this case and decide this case based only on the evidence as you heard it from the witness stand and the instruction of the Court? Can you do that?
>
> Juror: Give a fair verdict?
>
> Court: Yes.
>
> Juror: Yes.
>
> Court: And give a fair verdict on that?
>
> Juror: Yes.

Court: Now, I want you to do that without any use whatsoever or any thoughts whatsoever arising from these alleged phone calls. Can you do that?

Juror: Yes.

Court: That's outside and has nothing to do with this case. Is that clear to you?

Juror: Right, yes.

questioning that would permit each juror the opportunity to offer evidence in his own words would have been preferable, we cannot say that the court's questioning in this case failed to elicit sufficient responses to allow the court to assess the harm of the juror contact. Moreover, the court thoroughly and properly instructed the jurors after the hearing to assure their understanding of their responsibility. "[W]e will presume that jurors remain 'true to their oath and . . . conscientiously observe the instructions and admonitions of the court' absent evidence to the contrary." United States v. Thompson, 908 F.2d 648, 651 (1990) (quoting United States v. Greschner, 802 F.2d 373, 381 (10th Cir. 1986), cert.

The court then admonished the juror to refrain from discussing the incident with anyone.

denied, 480 U.S. 908 (1987)). Consequently, defendants failed to demonstrate actual prejudice, Day, 830 F.2d at 1105, and the district court correctly denied the motion for mistrial.[9]

III. Legality of the Wiretap

A. Probable Cause

Codefendants contend the district court erred in denying their motions to suppress the contents of conversations intercepted under the authority of a state court wiretap order. They principally argue the affiant's generic assertion of the inadequacy of normal investigative

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[9] Codefendants have argued also that prejudice to them is inherent in the fact of contact alone. They maintain a reasonable juror would assume the contact was initiated by the defense and would thereby be motivated to react negatively towards either or both defendants. we do not agree that is the only plausible reaction of a juror in this case; therefore, we find this argument unpersuasive.

techniques which necessitated the authorization for a wiretap failed to satisfy its burden to show probable cause.[10] Codefendants reference the affidavit of Scott Crosby, a detective in the Riley County Police Department in Manhattan, Kansas, which enumerated the efforts made to utilize normal investigative techniques and the need to intercept calls to determine the nature and scope of the criminal activity. Codefendants insist Detective Crosby's assertions were unfounded and were

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[10] Mr. Armendariz raises a number of other alleged problems with the wiretap, such as, the failure to properly minimize interceptions, to properly seal the record, to inform the court of the progress of the wiretap, and to designate a proper custodian of the records, in order to argue ultimately that the totality of the violations rendered the wiretap authorization constitutionally infirm. Nevertheless, it appears from the direction of his principle contention, Mr. Armendariz asserts the absence of probable cause to issue the authorization.

controverted when he was questioned in a prior hearing on the motion to suppress. Normal investigative techniques were either never tried or were prematurely abandoned, codefendants maintain.

We disagree. As the district court noted in its order denying the motion to suppress, the necessity requirement was fully satisfied in the thirty-three page affidavit supporting the application. The affidavit set forth a six-month effort which, using normal investigative techniques, including surveillance and the use of confidential informants, was frustrated by various problems local police were unable to overcome.[11] The

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[11] For example, the application for wiretap described the problems associated with surveillance of Mr. Armendariz's mobile home in an isolated rural setting and of his business in town, Oscar's Body Shop, which was fronted by a 2-lane state highway and afforded no appropriate position for observation. Threats of

district court also observed that the necessity requirement does not demand that every conceivable method of investigation has been tried and has failed or that other steps could have been taken. United States v. Carneiro, 861 F.2d 1171, 1176 (9th Cir. 1988). Consequently, the district court concluded there was probable cause to believe the targets of the wiretaps were committing or were about to commit drug offenses and the intercepted conversations would relate to the offenses. We agree.

Although application for the wiretap was made under the Kansas Electronic Surveillance Act, Kan.Stat.Ann. §22-2516, Kansas law conforms substantially to the

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bodily harm and the reputation for violence of individuals under investigation caused several of the confidential informants to sever their contacts with the police.

requirements of Title III. United States v. Savaiano, 843 F.2d 12280, 1291-92 (10th Cir.), cert. denied, 488 U.S. 836 (1988). The state procedure is incorporated under 18 U.S.C. §2516(2). Like the district court, we apply federal standards to determine whether the evidence derived from the interceptions is admissible. Elkins v. United States, 364 U.S. 206 (1960).

Under 18 U.S.C. §2518(3)(a) of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, the judge, reviewing an application for a wiretap, determines there is probable cause to believe a particular offense has been, is being, or is about to be committed, and that conversations related to the offense will be overheard. §2518(3)(b). The judge must also find

that normal investigative procedures have been tired and failed, are unlikely to succeed, or are dangerous. §2518(3)(c). While the necessity requirement assures that a wiretap intrusion does not supplant traditional investigative methods, it is not intended to place this tool off limits. "[T]he restriction must be interpreted 'in a practical and commonsense fashion.'" United States v. Brown, 761 F.2d 1272, 1275 (9th Cir. 1985) (quoting United States v. Bailey, 607 F.2d 237, 241 (9th Cir. 1979), cert denied, 445 U.S. 934 (1980)).

We believe the district court followed such an approach here. We review the district court's finding of probable cause for a wiretap under the same standard used for a search warrant, see United States v. Diltz, 622 F.2d 476, 481 (10th Cir. 1980), to determine whether the

facts and circumstances within the officer's knowledge based on reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has or is being committed. "Although we examine de novo whether 'a full and complete statement' was submitted meeting section 2518(1)(c)'s requirements, we review the conclusion that the wiretap[] [was] necessary in each situation for an abuse of discretion." Brown, 761 F.2d 1275 (citations omitted).

We do not believe the district court abused its discretion in finding the wiretap placed on the three telephones was necessary. There was a substantial basis to find probable cause existed tied both to statements of confidential informants, the results of police surveillance, and the documentation from pen registers in the investigation. We, thus, defer to the

district court's finding the wiretap was necessary for investigating authorities to determine the nature and scope of codefendants' criminal activity.

B. Failure to Identify Defendant Aguirre

As an additional basis for suppression, Mr. Aguirre contends the failure to name him in the application for wiretap under 18 U.S.C. §2518(4)(a) and to provide him with inventory notice under 18 U.S.C. §2518(d) invalidated the wiretap authorization and requires suppression of his conversations introduced into evidence.[12] Mr. Aguirre relies on United

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[12] Although Mr. Aguirre's name is mentioned in the affidavit supporting the wiretap application, it is not included on the list of individuals whose conversations the government has probable cause to believe will be intercepted. Mr. Aguirre notes the state district court eventually directed inventory notice to him only when the prosecutor submitted the request after the grand jury handed down its indictment.

States v. Donovan, 429 U.S. 413 (1977), which held the government must name those individuals it has probable cause to believe are engaged in the criminal activity under investigation and whose conversations are expected to be intercepted.

Albeit this holding, the Donovan Court, relying on Giordano, 416 U.S. at 505, and United States v. Chavez, 416 U.S. 562 (1974), reiterated that "[not] every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful.'" Donovan, 429 U.S. at 433 (citation omitted). The remedy of suppression is required only for a 'failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept

procedures to those situations clearly calling for the employment of this extraordinary investigative device." Id. (citation omitted). The Court found that "[i]n no meaningful sense" did the failure to identify an additional subject invalidate the authorization. Id. at 436. Surely, in this case, all of the requisite statutory factors necessary to support the authorization were present, and the sufficiency of those factors." Id, at 435.

Similarly, failure to promptly provide inventory notice to Mr. Aguirre does not undermine the wiretap authorization or warrant suppression. Id at 438; United States v. DeJesus, 887 F.2d 114, 117 (6th Cir. 1989); Savaiano, 843 F.2d at 1280. Under Kan.Stat.Ann. §22-2516(7)(d), inventory notice must be provided "[w]ithin a reasonable time but

not later than 90 days after the termination of the period of an order or extensions thereof." The state district judge authorized the application on February 8, 1989, and specified its termination on March 10, 1989. After the indictment was filed on May 3, 1989, within the ninety-day notice period, defendant concedes he received inventory notice. In addition, Mr. Aguirre has failed to show how he was prejudiced by the delay. Savaiano, 843 F.2d at 1291.[13] Indeed, the court granted defendant's

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[13] Although defendant distinguishes Savaiano on the ground that inventory notice was received before the indictment was returned, the court relied only on the fact that the 90-day notice period was satisfied and defendant failed to show prejudice because he received all the information "he would have obtained from the inventory, and considerably more, in timely fashion." Savaiano, 843 F.2d at 1291. In this case, Mr. Aguirre fails to specify what information he was untimely denied.

motion for an extension of time to file pretrial motions.

Although Mr. Aguirre raises important concerns immured into Title III to particularize the potential scope of any wiretap authorization, these concerns remain predicated on the underlying legality of the wiretap itself. United States v. Cardall, 773 F.2d 1128, 1134 (10th Cir. 1985). Finding no error in that premise, we affirm the district court's denial of suppression on this ground.

IV. Severance

Mr. Aguirre contends the district court abused its discretion in failing to grant his motion for severance. Mr. Aguirre had argued the jury would be unable to compartmentalize evidence the government could only offer against his codefendant and the consequent spillover

of guilt from Mr. Armendariz would be highly prejudicial. In particular, Mr. Aguirre complains that although he neither knew nor had ever spoken to the government's key witness, Randy Thomas, evidence offered by Mr. Thomas solely against Mr. Armendariz nevertheless swept him into that criminal activity. This prejudice was not cured, Mr. Aguirre states, by the court's instruction to the jury or single admonition during trial. Mr. Aguirre contends that this imputation of guilt coupled with the later jury contact incident necessitated the court's granting relief under Fed. R. Crim. P. 14.

Because the decision to grant a motion to sever is committed to the sound discretion of the district court, United States v. Cardall, 885 F.2d 656, 667 (10th Cir. 1989), to establish an abuse of discretion, defendant must show that

"actual prejudice resulted from the denial." Id, at 668, citing United States v. Hack, 782 F.2d 862, 870 (10th Cir.), cert. denied, 476 U.S. 1184 (1986). "Neither a mere allegation that defendant would have a better chance of acquittal in a separate trial, nor a complaint of the 'spillover effect' from the evidence that was overwhelming or more damaging against the co-defendant than that against the moving party is sufficient to warrant severance." Hack, 782 F.2d at 870.

Central to this prosecution was the common count of conspiracy to distribute marijuana. Although certain evidence applied only to Mr. Armendariz, other evidence, particularly recorded conversations between the two defendants, clearly links Mr. Aguirre to this "common thread." United States v. Rogers, 899 F.2d 917, 926 (10th Cir.), cert. denied,

111 S.Ct. 113 (1990). "In conspiracy cases, the general rule is that persons indicted together should be tried together." Id. at 926 (citation omitted). Moreover, we must assume the jury can and did follow the court's instruction to consider the evidence separately against each defendant. Cardall, 885 F.2d at 668. Because defendant cannot particularize any actual prejudice to his case, we affirm.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	Case no.
OSCAR ARMENDARIZ and GABRIEL AGUIRRE, Defendants.	)	89-40016-01/02

MEMORANDUM AND ORDER

Currently pending before the court are a motion to suppress evidence obtained via wiretaps, a proffer in support of a motion to compel the taking of a deposition, and a motion to suppress statements given by defendant Armendariz during interrogation by law enforcement officers. The court shall take up the motion to suppress the wiretap evidence and the associated motion to compel in this order. The motion to suppress statements given by defendant Armendariz shall be ruled upon in a separate order.

The motion to suppress the wiretap evidence is supported by briefs filed on behalf of defendants and by evidence presented during a hearing conducted on October 17, 1989. The motion to compel is party of a controversy which has continued

for some time regarding defendant's right to discover evidence for the motion to suppress. During the hearing on October 17, 1989, defendants' counsel requested leave to depose four witnesses. Depositions were requested for the convenience of the court in lieu of another evidentiary hearing. Defense counsel stated that if testimony via depositions was not agreeable to the court, then subpoenas for an appearance by the witnesses at an evidentiary hearing before the court would be requested. The court directed counsel to make a "proffer to the court through motion, affidavit or otherwise that the sworn testimony of [the] witnesses will demonstrate a factual or legal issue relevant to the defense of this case and that such testimony cannot otherwise be obtained through affidavit or stipulation."

Defendants have responded with a "memorandum proffer in support of a motion to compel disclosure by deposition of William Kennedy, County Attorney for Riley Count." Defendants suggest that the deposition of Mr. Kennedy may eliminate the need to depose other witnesses.

Mr. Kennedy made application for the wiretaps in question in this case. The memorandum proffer states:

> Mr. Kennedy has knowledge regarding the investigation of defendants. . . He can provide information and the determination that no other means of investigation were "necessity" requirement of 18 U.S.C. § 2518(1)(c) and (3)(c). . . It is vital to defendant's motion to suppress to know the information upon which Mr. Kennedy relied, because the affidavit is incomplete on this issue.
>
> The County Attorney can provide information to support that the application for the wire tap failed to include a "complete statement" as to whether or not other investigative procedures have been tried and failed and they reasonable appeared to be unlikely to succeed if tried or to be too dangerous". 18 U.S.C. § 2518 (1)

(c). Defendant Aguirre would further proffer to the Court that Mr. Kennedy can provide information as to the basis of the district court's decision that there was probable cause to believe that normal investigative procedures failed to reasonably appear unlikely to succeed or were too dangerous, as required by 18 U.S.C. § 2518(3)(c).

County Attorney William Kennedy has unique knowledge as to why the strict statutory requirements of 18 U.S.C. §§ 2510-2520 were not obeyed. . . . [A] deposition of County Attorney William Kennedy is necessary to reveal why the dictates of the statute were not followed. More specifically, defendants contend that: (1) the application omits a full and complete statement of facts concerning all previous applications, including requests for pen registers, as required by 18 U.S.C. § 2518(1)(e); (2) the order authorizing interception failed to specify the identity of Gabriel Aguirre as required by 18 U.S.C. § 2518 (4)(a); (3) that the interception was not conducted in a manner as to minimize the interceptions or communications as required by the order and 18 U.S.C. § 2518(5); (4) that progress reports were not made to the judge as directed by the order of authorization and 18 U.S.C. § 2518(6); (5) that the recordings of the contents of the interception were not sealed and placed in judicial custody as required by 18 U.S.C. § 2518(8)(a) and 18 U.S.C. § 2517(3); and (6) the Court failed to serve upon Gabriel Aguirre

> an inventory of the application, the entry of the order and fact of the conversations were intercepted as required by 18 U.S.C. § 2518(8)(d). County Attorney William Kennedy has the knowledge to explain the non-conformity with the dictates of the statute.

The limits upon the discovery powers of criminal defendants have been discussed previously by this court in this case. We have noted that defendants' request to depose Mr. Kennedy and others should be treated as a motion pursuant to FED.R.CRIM.P. 17 and that Rule 17 is not a discovery device. We have also noted that the court has the discretion to require additional investigation before enforcing a subpoena. Finally, we have stated that in order to contest the veracity of statements made in an affidavit to obtain wiretap authority, there must be a preliminary showing of falsity or reckless disregard for the truth by the affiant.

See Franks v. Delaware, 438 U.S. 154 (1978).

It is not sufficient for defendants to argue that the testimony of Mr. Kennedy is necessary to fill in the gaps of the affidavits used to obtain the wiretap authorization. If the affidavits did not contain the information required to permit a wiretap, then the evidence obtained by the wiretap must be suppressed. After a wiretap has been authorized, it is too late to redeem an affidavit which does not make the showing required to receive a wiretap.

It is not sufficient for defendants to argue that the testimony of Mr. Kennedy is necessary to prove the falsity or reckless nature of the statements made in the affidavit to obtain a wiretap. There has not been a satisfactory preliminary showing that a false or reckless statement

was made in the affidavit. Without such a showing, under Franks v. Delaware, supra, defendants cannot have an evidentiary hearing to explore the veracity of the affidavit. Otherwise, defendants could engage in a fishing expedition in hopes of developing an issue of the affidavit's truth.

Finally, defendants have not made a sufficient showing that Mr. Kennedy will supply testimony or information helpful to the following contentions: that the wiretaps were engaged for a longer period than necessary to satisfy the objectives of the investigation; that the wiretapped conversations were not properly minimized; that the targets of the wiretaps were not fully listed; or that the wiretapped conversations were not properly sealed. Defendants have made a proffer that Mr. Kennedy has information on some of these

issues. Defendants have not made a proffer that Mr. Kennedy's testimony would in any way support defendants' position on any of these points. Defendants' proffer merely indicates that Mr. Kennedy has knowledge of these matters. Moreover, it should be noted that defendants have other information available to them to make an argument on these issues. There is no reason to think that a deposition of Mr. Kennedy, beyond the testimony and documents already permitted by the court and supplied by the government, is necessary for the defense of this case.

For these reasons, defendants' motion to compel the deposition of Mr. Kennedy shall be denied. The court shall proceed to rule upon defendants' motions to suppress on the basis of the evidence and argument before the court. Several arguments are made in the motions to

suppress.

1. Necessity. A major argument of the defendants is that the affidavit in support of the wiretaps failed to make a full and complete explanation as to why other investigative techniques had failed or reasonably appeared unlikely to succeed if tried or to be too dangerous. Such a showing is required under Kansas state las, K.S.A. 22-2516(1)(c), and 18 U.S.C. § 2518(1)(c).

"The purpose of the necessity requirement is to ensure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." U.S. v. Carneiro, 861 F.2d 1171, 1176 (9th Cir. 1988). The fact that different or additional steps could have been taken does not demonstrate an abuse of the wiretap laws. Id. at 1178. The

government is not required to show that every conceivable method was tried and failed or that all avenues of investigation have been exhausted. U.S. v. Alfaro, 838 F.2d 158, 163 (6th Cir. 1988); U.S. v. Page, 808 F.2d 723, 729 (10th Cir. 1987). All that is required is that serious consideration be given to non-wiretap techniques prior to applying for a wiretap and that the court know the reasons for the belief that such techniques will likely be or have been inadequate. U.S. v. Cooper, 868 F.2d 1505, 1510 (6th Cir. 1989). Courts have recognized that wiretaps can be valuable in developing information regarding the scope and complexity of a drug conspiracy. See U.S. v. O'Connell, 841 F.2d 1408, 1415 (8th Cir. 1988); U.S. v. Brown, 823 F.2d 591, 598 (D.C.Cir. 1987). Court have also recognized that an investigation need not

stop when substantial evidence of criminality has been uncovered; the investigation may continue to find the scope of the criminal enterprise. U.S. v. Leisure, 844 F.2d 1347, 1359 (8th Cir. 1988); U.S. v. Johnson, 645 F.2d 865, 867 (10th Cir.) cert.denied, 454 U.S. 866 (1981).

The court believes the necessity requirement has been satisfied in this case. the affidavit used in this case to support the application for wiretaps is 33 pages long. It describes in some detail the observations and investigative effort of law enforcement officers over a significant period of time--more than six months. The use of investigative information from other jurisdictions is mentioned. The statements of confidential informants are discussed in some detail. The use of periodic surveillance is

described and a lengthy review of the results of pen registers is made.

The affidavit also indicates problems with certain investigative methods. The affidavit explains that informants were in fear of bodily harm and that they were unwilling to introduce an undercover agent into the illicit operation. Only one controlled buy was made by an informant who then refused further cooperation because of threats of bodily harm. Similar threats and the apparent reputation for violence of the persons under investigation caused other informants to refuse to talk to police. The judgment of the officers was that grants of immunity would not overcome the intimidation of potential witnesses. Moreover, the record does not indicate that the officers had a member of the organization under charges and could

persuade that person to supply information against organization.

Periodic surveillance was employed with some success. But, it was determined that full-time surveillance would not be successful in achieving the aims of the investigation largely because of the physical location of the premises in question and efforts at countersurveillance by the suspects. There were also complaints from some surrounding residents. The effectiveness of surveillance was also restrained by limits on manpower and money. Defendants have noted that surveillance was used after the wiretaps were in place. However, the wiretaps made physical surveillance much easier and effective because the officers were able to pinpoint a time, place, and person or persons to surveil.

The officers did not feel that adequate probable cause had been developed for a search warrant at a particular time and place. Moreover, they felt that a search warrant would not provide sufficient information to identify and prosecute all the members of the conspiracy or connect any drugs found during the search to a source of supply, which the officers felt was outside the State of Kansas.

In summary, the court believes the affidavit and the evidence taken regarding the investigation reveal that the officers gave serious consideration to non-wiretap techniques prior to applying for the wiretaps. The affidavit sufficiently stated why traditional investigative methods were not or would not be successful or prudent in developing information regarding the scope and

complexity of the suspected drug conspiracy.

2. Previous applications for pen registers. Defendants argue that contrary to federal law, 18 U.S.C. Section 2518(1)(e), the application for the wiretaps failed to disclose that applications for pen registers had been made in this investigation. The court does not believe the law requires that reference be made to pen register applications since the section in question is in a chapter dealing with wiretaps. Pen registers are covered in a different chapter of the United States Code. In any case, extensive reference to the results of pen registers is made in the affidavit for the wiretaps. Thus, the use of pen registers was not made a secret. Finally, even if the failure to disclose applications for pen registers was a

violation of the statute, the court does not believe it warrants suppression of the evidence. See U.S. v. Abramson, 553 F.2d 1164 (8th Cir.) cert. denied, 433 U.S. 911 (1977) (failure to disclose that prior wiretap had been suppressed does not warrant suppression of subsequent wiretap evidence). The judge had a full and complete statement of relevant facts to determine whether to issue authority to wiretap.

3. Failure to mention defendant Aguirre as a target of the wiretaps. Defendant Aguirre is mentioned in the affidavit in support of the wiretap, but he is not listed as an individual whose conversations the government has probably cause to believe will be intercepted by the wiretap. The court believes it is a close call whether there was probable cause to believe that defendant Aguirre

would participate in calls the government sought to record. But, even if the government had sufficient cause to list defendant Aguirre as a target of the wiretap, the failure to do so does not require suppression of the wiretap evidence. Untied States v. Donovan, 429 U.S. 413, 435-37 (1977).

4. Progress reports. Defendants argue that progress reports ordered by the judge who authorized the wiretaps were not made. The only evidence before the court is that oral unrecorded progress reports were made. No authority has been provided to the court to suppress wiretap evidence because of the absence of written or recorded progress reports. Therefore, this argument of suppressions shall be denied.

5. Sealing. Defendants assert that the tapes from the wiretaps were not

sealed. The evidence before the court does not support this assertion. It appears the tapes were sealed shortly after the wiretaps were disconnected. Therefore, this argument for suppression shall be denied.

6. Inventory notice. Defendant Aguirre argues that he did not receive an inventory notice as required by law. however, defendant has not made any showing or argument that his defense has been hampered by this omission. In U.S. v. Savaiano, 843 F.2d 1280, 1290-92 (10th Cir. 1988), the Tenth Circuit held that a showing of prejudice to a defendant is necessary to suppress wiretap evidence on the grounds of a violation of the inventory rule. Without such a showing in this case, the court finds that defendant Aguirre's inventory argument does not warrant granting defendants' motions to

suppress.

7. Minimization. Defendants contend the officers executing the wiretap orders failed to minimize the interception of communications that were not otherwise subject to interception under the order. Defendants make specific reference to one recorded conversation regarding a matter of romance. The Supreme Court has stated:

> The [federal wiretapping] does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to 'minimize' the interception of such conversations. Whether the agents have in fact conducted the wiretap in such a manner will depend on the facts and circumstances of each case.

Scott v. Untied States, 436 U.S. 128, 140 (1978). The Tenth Circuit calls the minimizaton question "one of reasonableness." U.S. v. Apodaca, 820 F.2d 348, 350 (10th Cir. 1987). In this case, the government has filed a report indicating that of over 2,000

conversations recorded from the wiretaps in this matter, there were 54 calls over three minutes which were not minimized. Compared with Apodaca, where 1,065 conversations of more than two minutes were not minimized out of a total of 1,904 recorded conversations, we believe there is good cause to believe that the law enforcement officers acted reasonably in minimizing nonpertinent calls. We understand that we cannot rely upon statistics alone to decide the reasonableness of the officers' actions. The officers' legitimate concern with determining the scope of what they reasonably believed to be a large drug conspiracy also provides justification for extensive monitoring. Given defendants' failure to provide grounds for doubting the reasonableness of the officers' conduct other than the one romantic call

which apparently was not minimized, there is adequate support in the record for finding that the officers acted reasonably while monitoring the wiretaps. Therefore, we reject defendants' minimization argument for suppression of the wiretap evidence.

8. Failure to stop wiretapping before 30 days. The wiretap order in this case directs:

> Such interception shall not automatically terminated when the type of communications described in paragraph C [conversations regarding sale and possession of cocaine and marijuana] have first been obtained, but may continue until communications are intercepted which reveal the scope and the extent of the controlled substances distribution operation, names and addresses of the participants and the source of the illegal narcotics, or for a period of thirty (30) days from the effective date of this order, whichever is earlier.

The interception in this case continued for a full 30 days. Defendants argue that

sufficient information to meet the objections of the investigation had been garnered before 30 days passed and at that time the wiretaps should have ceased. The court disagrees. The wiretaps were issued for the broad purpose of revealing the scope and extent of a drug conspiracy as well as the identity and addresses of the members of the conspiracy and the source of the drugs. Progress reports to the judge who issued the wiretap order were made weekly. The testimony before the court is that the judge never concluded the goals of the investigation had been reached. The evidence before the court indicates that the suspected conspiracy involved numerous persons from the Manhattan, Kansas area, and also persons from the Kansas City area, New Mexico and California. The court has no reason to believe that the full scope of the alleged

conspiracy was ever completely determined by the officers. We are persuaded that the officers were warranted in continuing the wiretaps for the full 30 days permitted by the wiretap order. See U.S. v. Harvey, 560 F.Supp. 1040, 1058 (S.D.Fla. 1982) aff'd, 789 F.2d 1492 (11th Cir.) cert. denied, 479 U.S. 855 (1986) ("is permissible that a wiretap continue until the government accumulates enough evidence to determine the scope of the conspiracy and the identity of the individuals involved.").

9. Probable cause. Finally, it appears from oral argument that defendants wish to incorporate the arguments of other defendants who have since waived their motions to suppress. These arguments include a challenge to whether probable cause existed to issue the wiretap order. Defendants Armendariz and Aguirre have not

elaborated upon this argument. After reviewing the motion and affidavit in support of the wiretap order, the court is convinced that probable cause existed for the interception of conversations via wiretaps. The application and affidavit for the wiretaps establish the past drug conviction record of defendant Armendariz as well as his continuing relationship with other known or suspected drug traffickers. Confidential informant reports indicated that defendant Armendariz' brother transported drugs to defendant Armendariz and that defendant Armendariz had links to a suspected drug dealer in New Mexico. Pen register results also provided reasonable grounds to believe that the phones to be tapped were used by known or suspected drug traffickers to further their illicit trade. In sum, there was probable cause

to believe that the targets of the wiretaps were committing or were about to commit drug offenses and that communications concerning the offenses were also obvious grounds to believe that additional communications regarding drug offenses would occur after the first conversation concerning a drug offense was intercepted.

CONCLUSION. The court believes it has discussed all the arguments made in favor of the motions to suppress and the proffer. If an argument has been overlooked, counsel may raise it again. To summarize what has been stated above: the motion to compel the deposition of William Kennedy is denied; defendants' motions to suppress are denied; and an order shall issue later regarding the motion to suppress statements made by defendant Armendariz. The trial of this

case is hereby set for January 5, 1990.

IT IS SO ORDERED.

Dated this 6th day of December, 1989, at Topeka, Kansas.

United States District Judge

TRANSCRIPT VOL. IV QUOTATIONS

TRANSCRIPT VOL. IV, pp. 709-713

Testimony of Juror Funk

A. Okay. Well, first of all, last-- not last night but the night before, I stayed in town here, and I don't know what time it was, but in the evening I got a call from a guy by the name of Bill. That's all he said. He said he was working for KMKF in Manhattan, and I had won a drawing from a body shop of $1,000 for body work on a car. And I thought, well,

that sounds legitimate. He said somebody else had registered my name as a prank and then I ended up winning.

Well, I says, "Okay." And he says, "But I need to meet you for dinner because we need to have a live promotion for advertising, they want their free advertisement." And I said, "Okay." And so we decided we'd meet up at the Pizza Hut down at Southwest Sixth, because that's the only thing I thought of right off the top of my head, and we're-- it was going to be. And he said, "Thanks," and hung up.

Well, then, I called my wife, which was in Manhattan, and she had got-- he had called her before he called me to find out that number. And when I called her I said, "We need to check

this out." I said, "You call KMKF," because it was a local number, and I wanted her to find out if there was anybody that worked there by the name of Bill. So she did, and she called me right back and there wasn't.

She looked to see if there was a body shop-- this body shop was in Ogden. It was-- I can't remember the name, but the body shop was there, too. So he had done his research. And it made me mad, so I called him. He left me a number in case something wouldn't work out, and it was a Manhattan number, so I called him back, and I got the number at my in-laws. I can't remember, it's 776 something.

And I called him back and I told him I didn't appreciate the way he was doing business, and I wanted to know

what his last name was and everything. And I said, "As far as I'm concerned this is false advertisement. You have-- you don't work for KMKF."

And then he fed me some story, "Well, no, I don't," he said, "but I'm trying-- have you ever heard of these super saver coupon books?" I said, "Yeah." And he said, "Well, that's what this is kind of." And I said, "Well, I don't want it." So we canceled it, and then that's where it left off at.

So last night, sitting and watching the game about 9 o'clock, he called up again, and he said-- well, my sister-in-law answered the phone, and she said, "May I tell him who's calling?" And he said, "Ken." And I got on the phone, and he says, "This

is Kenny Thomas, the same guy that called you last night, and I'm sorry for all the charades I pulled on you last night, but seriously, we need to get together and talk."

And I said, well-- I said-- he says, "Does Kenny Thomas ring a bell for you?" And I said, "No, it doesn't." And he said, "Well, does Randy Thomas?" I thought for a little while. I thought it did, and then I remembered it was one of the witnesses on the trial. And he says, "I'm his brother."

And right away that clammed me up. I didn't know what to say. And I-- he said, "I need to meet you." And I ways, "Well, I can't, I'm a jury member, and I'm just not supposed to talk about this case to anybody." So he says, "Well, I will make it well

worth your while." He says, "No matter what I do, you won't meet me?" And I says, "No, I can't," and I hung up on him. And I went to bed last night thinking about it, and I dreamt about it and everything else. So I don't know.

Q. All right. You had no other contact with anyone, no one has talked to you about the case?

A. No.

Q. And you don't even know, you couldn't even determine from the conversations you've had, what they were talking about-- what he was talking about or what he was intending to do or what he wanted you to do. Is that right?

A. No, I couldn't figure anything. He didn't say anything on the phone. My wife has one of those phone books that you can-- the numbers are in,

you know, order. She tried to find the number in that book from work, and she couldn't find it, it wasn't listed. So we just-- you know, she wanted to find out more.

But she was really scared last night-- or the night before when we went to bed, because she thought it was some jerk calling and finding out I wasn't there and was going to do something. And if I would have-- she still doesn't know about what happened last night or she'd really be scared.

TRANSCRIPT VOL. IV, p. 721, lines 11-23

Q. So this aroused some thoughts in your mind, apparently, as to what this was all about. Is that correct?

A. Yes.

Q. But it would not interfere in all of the requirements I placed for an

independent juror at the start of the case. Is that correct?

A. No, I don't feel it would be on my part.

Q. And if you need to serve, you can now decide this case based on the evidence you heard from the witness stand and the instructions of the Court. Is that correct?

A. That's correct.

TRANSCRIPT VOL. IV, p. 726, lines 14-19

Q. Now, let me find out, in deciding this case now, can you decide this case based solely on the evidence you heard in the courtroom and the instructions of the Court and remove this entirely from your mind? Can you do that?

A. Very definitely I could.

TRANSCRIPT VOL. IV, p. 752, lines 10-23

MR. WINTERBOTTOM: Your Honor, while waiting for the next one, might I suggest that you ask your questions in a somewhat nonleading manner. The problem with the questioning with Mrs. Wentworth was that you kept asking her, "Well, this hasn't made any difference to you." "This hasn't affected your deliberations." Unfortunately, my feeling is if you ask questions like that of these jurors, we're not really finding out what their true feelings are. I think, given your position of authority and asking questions in that matter, of course, she's going to say that it hasn't because you're telling her that it hasn't.

TRANSCRIPT VOL. IV, p. 752, lines 20-23

I think, given your position of authority and asking questions in that

matter, of course, she's going to say that it hasn't because you're telling her that it hasn't.

TRANSCRIPT VOL. IV, p. 756, lines 15-22

Q. Do you remember all the work we went to qualifying jurors at the start of this. Has this had any -- this outside information, you're not going to consider this in any way. Is that correct?

A. No.

Q. As far as this case is concerned.

A. No.